No. 66 & 67.
Reply Brf. of R. M. Hughes for Victory.
Filed Oct 15 1895.
OCT 15 1895
JAMES H. McKENNEY

United States Supreme Court.

Nos. [redacted].

IN THE MATTER OF THE PETITION OF THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, CLAIMANT OF THE STEAMSHIP PLYMOTHIAN, FOR A WRIT OF CERTIORARI.

IN THE MATTER OF THE PETITION OF JOHN MACINTYRE AND OTHERS, CLAIMANTS OF THE STEAMSHIP VICTORY, FOR A WRIT OF CERTIORARI.

REPLY TO BRIEF OF COUNSEL FOR CARGO.

ROBERT M. HUGHES,
Proctor for the Victory.

W. T. Barron & Co., Law Printers, Norfolk, Va.

United States Supreme Court.

Nos. 757, 758.

IN THE MATTER OF THE PETITION OF THE PORT OF PLYMOUTH STEAMSHIP COMPANY, LIMITED, CLAIMANT OF THE STEAMSHIP PLYMOTHIAN, FOR A WRIT OF CERTIORARI.

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REPLY TO BRIEF OF COUNSEL FOR CARGO.

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It is not proposed, in this brief, to further discuss the questions of law and fact raised on the petition, except one remark, in reply to the point made on page 9 of the counsel's brief, to the effect that the difference between what the Victory

would have to pay in case the rule of equal division was established, and what she would have to pay in case the rule of unequal division was established, is only a few thousand dollars.

In deciding whether to issue a writ of certiorari, this court has been accustomed to go, not so much upon the amount involved as upon the importance of the question decided. In this case, nothing can be more important than a prompt settlement (if it has not already been settled) of the method of division of damages in collision cases. There are now about sixty district judges and nine intermediate appellate courts at liberty to divide these damages, according to their caprice, instead of by any settled rule, and unless this court shall promptly interpose, the confusion will be indescribable. The actual difference, as shown by a careful calculation, is over $9,000.

The counsel next contends, on page 10 of his brief, that the cargo, being entirely innocent, should not be delayed for two or three years by the settlement of this question as between the vessels, but that the court should direct immediate payment of the cargo claims and leave this for future adjustment.

Such action on the part of this court would be tantamount to a denial of justice, for, if the Victory were to pay the cargo her full bond, and attempt to go against the Plymothian, she would at once be met with the point that there is no contribution among wrong doers, and to issue a writ of certiorari under such conditions would be a mockery.

Besides, he can move to advance the cause. We will join in the motion.

The counsel next contends, on page 10 of his brief, that the vessels should be required to give further bonds to secure the claims of the cargo, and bases it on the idea that the sureties are not residents of the Eastern District of Virginia, and

that it is necessary to avoid any question as to responsibility for accumulations of interest subsequent to the decree.

The bonds given in the case are not contained in the record, for the reason that the stipulation of counsel, entered into for the purpose of shortening, as much as possible, a record necessarily very bulky, provided that they should be omitted, but recited that they had been given. (R. 480-1.)

In order to consider this point properly, a certified copy of the bond, given by the owners of the Victory, is printed as an appendix to this brief. It is true that the sureties were residents of New York, a very common practice in the Eastern District of Virginia, where it is difficult to obtain sureties for large amounts; but it will appear that the bond has on it as sureties the well known firm of Baring, Magoun & Co.; it will further appear that it is expressly conditioned and provided for any appellate court to which the cause might proceed, showing that such was in contemplation of the parties at the time; and last, but not least, it will still further appear that the counsel for the cargo, at the time the bond was given, placed the following endorsement upon it:

"The foregoing stipulation for value is hereby approved in form, amount and sufficiency of surety. Dated New York, December 9th, 1891. Butler, Stillman & Hubbard, Proctors for Libellants."

There is no charge or intimation that the sureties have since become insufficient, nor have they.

As to the point that additional security is necessary, in order to provide for the accumulations of interest subsequent to the date of the decree, that would be entirely unnecessary, as the sureties on that bond are liable for such interest.

This is expressly decided in the case of the *Manitoba*, 122 U. S., 97. The sureties are not questioning their liability in any way, and if they did, this decision would be a lion in their path.

The claimants of the Victory are many in number, and are all residents of Great Britain. It is extremely difficult, among so many, to raise the requisite amount of funds which would be necessary in case a new bond is required; the correspondence among so many, and probably among a great many more underwriters back of them, would be tedious, and any one, by refusing to contribute his proportion, might put it out of the power of the others to give a bond.

In order to give these bonds at the outset, all these arrangements had to be made, heavy commissions had to be paid to those who signed the bond, and these commissions collected among the various parties liable. They have gone to this trouble, they have secured at this great trouble and expense the sureties necessary, under the idea of all parties that this was done once for all, and to require them now, in the absence of any intimation that the bond has become unsatisfactory, to go to all this trouble again, when they no longer have local representatives, when their vessel is no longer in the District, would be to put them to an expense equally unnecessary and heavy, and might probably result in their failure to secure the relief to which they are entitled.

If they had made out a case calling for the interposition of this court by certiorari, the court ought not to allow their case to be defeated by mere incidental questions.

Respectfully submitted,

ROBERT M. HUGHES,

Proctor.

APPENDIX.

VICTORY BOND.

DISTRICT COURT OF THE UNITED STATES, }
EASTERN DISTRICT OF VIRGINIA. }

In the Matter of the Petition of the Owners of the Steamship Victory for a Limitation of Liability.

WHEREAS, A libel was filed in this court on the 27th day of November, A. D. 1895, by Stephen Augustus Ralli and others, against the steamship Victory, her engines, boilers, machinery, tackle, apparel and furniture, to recover damages for collision, under which libel the vessel has been attached, and is now in custody of the marshal.

AND, WHEREAS, on the petition of John MacIntyre, Jr., Thomas C. MacIntyre, James Allen MacIntyre, Cuthbert Hutchinson, Peter Allen, George Y. Blair, William H. Gould, James Brotherton, Caroline Rae, Thomas W. Spencer, Joseph Frain, Ann Blenkinsop, Michael J. Wilkinson, Susan Weekes, Richard Leitch, and the British Steamship Investment Trust, limited, owners and claimants of the said vessel, her appurtenances, etc., the court ordered that stipulations might be given by the said owners of the Victory, or some one of them, with sufficient sureties, in the sum fixed by an appraisement; and, whereas, the appraisers determined the value of said vessel and her appurtenances to be $67,500, such stipulation to stand in the place and stead of the said vessel and her appurtenances, according to the provisions of the Acts of Congress for restricting the liability of ship owners, etc.; it appearing that there was no freight on said voyage.

Now the condition of this stipulation is such that if the said owners of the said steamer Victory, claimants, and George C. Magoun shall, upon the final order or decree of the district court, made and entered in the above stated cause or in any cause or proceeding commenced, or which may be commenced in the said court, to establish and enforce any lien or claim upon the said steamship Victory, her engines, boilers, machinery, tackle, apparel and furniture, and the final order or decree of any appellate court to which the said proceedings or any of them may be removed, or at any other time, as

the said court or courts shall direct, pay into the registry of this court the said sum of $67,500, the appraised value of the said vessel, as aforesaid, or such part thereof as the said court or courts shall direct, then this stipulation to be void; otherwise to be and remain in full force and virtue.

JOHN MACINTYRE, JR., AND OTHERS,
Owners and Claimants of Steamship Victory, Her Appurtenances, etc.
S. ELCOATE, *Master.*

BARING, MAGOUN & CO.,
By H. L. GRIGGS,
GEO. C. MAGOUN.

Taken and acknowledged this 9th day of December, 1891, as to Baring, Magoun & Co., and Geo. C. Magoun, before me,

Notarial Seal.

GEORGE CROMWELL,
Notary Public, Richmond County.

Certificate filed in New York County.

Southern District of New York, ss.:

George C. Magoun, party to the above stipulation, being duly sworn, doth depose and say that he resides in the City of New York; that he is worth the sum of One Hundred and Thirty-five Thousand Dollars ($135,000) over and above all his just debts and liabilities. GEORGE C. MAGOUN.

Sworn to before me this 9th day of December, 1891.

Notarial Seal.

GEORGE CROMWELL,
Notary Public, Richmond County.

Certificate filed in New York County.

The foregoing stipulation for value is hereby approved as to form, amount and sufficiency of surety.

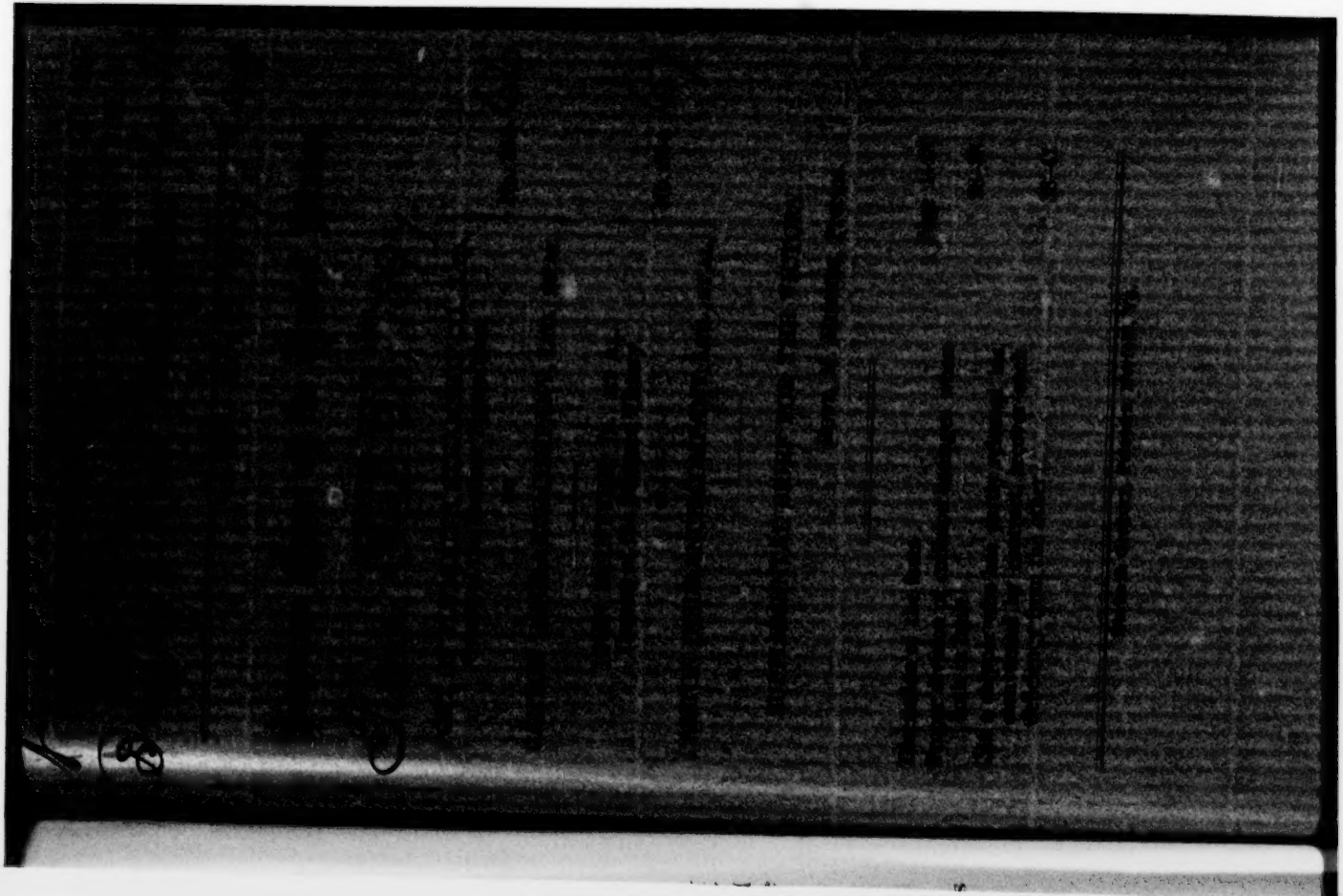
Dated New York, December 9th, 1891.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants.

A copy—Teste:

H. S. ACKISS,
Clerk U. S. District Court, Eastern District of Virginia, Norfolk.

U. S.
District Court
Seal.



United States Supreme Court.

OCTOBER TERM, 1896.

Nos 353 and 354.

VICTORY—PLYMOTHIAN COLLISION CASES.

SUPPLEMENTARY BRIEF FOR THE VICTORY.

The different questions in this case were discussed in some detail in the petition for a certiorari filed by John MacIntyre and others, owners of the Victory, and the brief printed as part thereof. This is intended to be supplemental to that brief, and the court is requested to read that and then follow it with this. Reference is made to that brief for the statements as to the facts, but as the time allowed for oral argument is too limited to discuss the numerous questions involved in this case, it is thought best to elaborate some of the points therein discussed.

The perusal of the opinion of the District Court (R. 447), and the opinion of the Circuit Court of Appeals (R. 498), will show that the main fault which both courts condemned in the Victory, was the fact that she took the eastern side of the channel in coming up just before the collision.

The basis of this holding was the decision, first, of the District Court, and then of the appellate court, that the waters of Elizabeth River were subject to the International Rules and not to the Federal statutes and the Supervising Inspectors' Rules, and that therefore she violated Rule 21 of the International Rules, requiring vessels to keep on the

starboard side of the channel. The main discussion up to this point in the case has been on that proposition.

This question has been settled by this court since the decisions in the lower courts and since the filing of these petitions for a certiorari. It has expressly decided in the case of *the Delaware, 161 U. S., 459*, that the International Rules do not apply in pilotage waters, thus sustaining the position which the Victory has taken from the outset in this case. As there is no starboard-hand rule contained in the Federal Rules or the Supervising Inspectors' Rules, this decision vindicates the navigation of the Victory as to this point as a question of law.

"It is proper, perhaps, to remark here that I do not subscribe to the doctrine advanced on behalf of the libellants against the Milwaukee, that vessels navigating rivers must, in all cases, when meeting, keep to the right of the centre of the navigable channel. I know of no such law in this country, and there is no such custom in the navigation of the channel in question. Vessels navigating rivers in this country, like vehicles in a highway, may use any part of the channel they may see fit, observing, however, in all cases when meeting or passing other vessels, the ordinary rules of navigation."

The Milwaukee, 17 Fed. Cas., 431.

Hence the only ground on which they could hold the Victory to have been in fault, as far as this rule is concerned, is that it is the custom of the Elizabeth river to navigate in this way. No such custom is proved in the case. It is true that Mardon and Henley give their opinion as marine lawyers that the law requires it, but Mardon had never been to Norfolk before and does not profess to testify about it as a local custom, and even Henley, the pilot, does not speak of it as a local custom, but as a general rule governing all channels. In other words, they agree with the District Court and Circuit Court of Appeals on the law questions involved, and differ with this court.

But they do not prove a local custom. Not an iota of proof of that custom is in the case.

As the failure of the Federal Rules and the Supervising Inspectors' Rules to insert the starboard-hand rule could not have been unintentional, we may therefore contend that there is no law or custom requiring the Victory to keep to the starboard-hand coming up, but that in harbor and pilotage waters the whole channel is free for navigation.

It is hardly thought worth while to discuss that portion of the opinion of the Circuit Court of Appeals which confuses the porthelm rule with the starboard-hand rule and states that there is such a regulation in the Federal statutes. The rules are so different that it is a matter of surprise that the court should have confounded them.

In the Lawrence case, 54 F. R., 542, a vessel was held to blame by this very court for going along the western side of the channel instead of the east, on account of the fact that vessels were anchored there.

Goodwin, one of the Plymothian's witnesses, proves a similar state of affairs on the occasion of this collision (R., 380).

THE WHISTLES.

The first evidence on this subject is that of the three men from the steamer Princess, taken but two days after the accident. (Wigham, R. 21; South, R. 25, and Rankin, R. 30.) They sustain the contention of the Victory.

The next on the subject is that of the Victory's crew.

The next is that of Swain, of the barge Storm King, taken about a year afterwards. He sustains the Victory's contention. (R., 289.)

Of the Plymothian's crew, the first three examined know practically nothing on this subject. (Scullard, R., 165; Cronquist, R., 173; Pearse, R., 178).

Their next witness, Ham, knows a great deal about the whistles. He says (R., 185):

'Before we left the pier the whistles were blown, to give vessels notice that we were coming, several times, and also the whistles were blown to salute the tugs Pioneer and Commodore. Q. Did you hear those whistles, and how were they with respect to being loud and clear? A. Perfectly distinct; then, after that, my attention was drawn to the whistles by hearing our whistle blown once. I heard it blow twice before I heard any answer from the Victory, and then she replied with two blasts * * * after he replied with two blasts we gave three blasts, and the engines went full speed astern," etc.

Their next witness, Schroder, says (R., 202):

"Shortly after we got around the buoy and got straightened up, I took notice that our whistles were blowing. * * * Q. You were walking backwards and forwards and heard the whistles? A. I heard two blasts; yes, sir. Q. Had you heard any whistles before that time? A. No, not that I took any notice of. Q. I mean from your vessel at the time she left the pier or afterwards? A. After she left the pier? Q. At the time she left the pier did you notice any whistles blowing? A. No, sir. Q. How far after you passed buoy 9 was she when you heard those whistles? A. Very shortly. Q. What was that whistle? A. Our whistle, a single blast. Q. How many times? A. Three times I heard distinctly. * * * Q. Did you hear any answers to those whistles? A. I didn't notice any answer."

Their next witness, Lyons (helmsman), says (209):

"Q. Did you hear the whistle of your steamer going? A. Heard two separate whistles, sir. Q Of how many blasts? A. I heard three blasts to back the engines. Q. You heard three separate whistles and then heard three blasts to back the engines? A. Yes, sir. Q. Did you hear any whistles except those? A. I didn't notice. Q. Did you hear any whistles as you left the pier? A. I didn't take notice of it. Q. Did you hear any whistles or salutes sounded upon passing any small boats? A. I

didn't take notice. Q. The only whistles you did observe were two single blasts, which were given previous to the three blasts when the engines were put astern? A. Yes, sir. Q. You heard two single blasts and three for astern? A. Yes, sir. * * * * Q. How were they in respect to being loud, clear and distinct? A. They were clear; I could hear them clear. Q. Was there any steam or anything in them to obstruct them? A. They sounded clear to me in the pilot-house."

Again, page 210:

"Q. Did you hear any signal given to (by?) the other vessel, the Victory? A. Never took any notice of it, sir."

Their next witness, Hendema (deputy helmsman), on page 219, Plymothian evidence, says:

"Q. What was the next order? A. Then we heard some whistle blow and steadied the helm. Q. You did hear some whistles blown; do you know what they were blown to? A. No, sir, didn't take any notice."

Again, page 220:

"Q. Did you hear the whistles of your steamer given? A. Yes, sir. Q. How were they in respect to being loud and clear? A. The whistles were all right; they tried them before they left the pier, sir; tried the whistles. Q. And you heard them during this voyage down the river blow several times? A. Several times. * * * Q. Did you hear any signal blasts of your whistle sounded? A. Yes, sir. Q. How many? A. Three; close to the other. Q. Then what did you hear? A. Afterwards she blew three quick after each other, sir."

Their next witness, Baird (p. 231), says:

"Q. Did you hear the whistles sounded from your steamer that day? A. Yes, sir. Q. How were they in respect to being loud, clear and distinct? A. I heard them three times. Q. How were they in respect to sound? A. Clear sound, sir. Q. Nothing the matter with it? A. No, sir. Q. What whistles did you hear? A. I heard three single whistles being blown. Q. Did you hear any others? A. Only three for astern."

Again, on page 232:

"Q. Did you hear any answers or was there any answer? A. I saw answers but couldn't tell what they were. Q. When did you see them? A. After the second whistle. Q. You don't know what that was? A. No, sir; don't know how many whistles were blown. Q. Do you know whether she blew any at all or not? A. Yes, sir; she blew something, but I couldn't tell you what, sir."

Wood, page 238, says:

"Q. State what whistles you heard upon first leaving the pier? A. Three short ones for leaving the pier. Q. Three short ones were blown just as you were leaving the pier? A. Just close after; I don't know what was the meaning of it. Q. Did you hear other whistles after that? A. Yes, sir, afterwards. Q. Was anything the matter with the whistles on that afternoon? How were they in respect to being loud and clear. A. The ones aboard of us were loud, distinct. Q. The whistles on your own vessel were loud and clear. A. Yes, sir." * * *

"Q. After passing that buoy did you hear any whistles on the Plymothian? A. Yes, sir. Q. Just describe what whistles you did hear? A. I heard three, one after the other, plain and distinct." * * Q. Did you hear any whistle after that? A. Just some little time before the collision there were three or four little whistles."

And on p. 244 he testifies that American whistles are much better than English.

Ecrath, page 256:

"Did you hear the whistles of the Plymothian at any time that afternoon? A. I heard one set just as I went down from the forecastle head. Q. Did you hear it blowing before that time as you were passing any tugs? A. Yes, sir; I heard three as we passed—I don't remember the name of the boat—the water boat. * * * Q. Did you hear any whistles in your shop? A. Yes, sir; but I didn't notice what they were. Q. These whistles you heard, how were they in respect to being loud and clear? A. The first one I heard when I went down from the fore-

castle head, they were clear. Q. How about the ones to the water boat? A. Yes, sir; they were clear."

Mardon (page 262), in describing the start from the wharf:

"I rang the telegraph slow ahead; the pilot gave the order slow ahead, and I rang the telegraph; immediately that was done the whistle was blown. Q. Who blew that whistle? A. The pilot blew the whistle." * *

Again, page 264:

"A. As we came close to the buoy 9 the water boat Pioneer was lying close to the east of the buoy and the Commodore was lying to the west— Q. Out in mid-channel? A. Yes, sir; and my being acquainted with both of them, I gave a salute in passing. * * * Q. You heard those whistles? A. Certainly. Q. How were they in respect to being clear and distinct? A. Clear and distinct. Q. How about being loud? A. Loud, clear and distinct; no water or steam. Previous to leaving the dock the first thing I did was to blow the whistle to blow the water out. Q. That was some minutes before leaving the dock? A. Yes, sir. Q. And upon leaving the dock you blew the signal whistle that you were leaving? A. Yes, sir. Q. And afterwards blew the whistles to the Commodore and Pioneer? A. Yes, sir."

Again, page 264:

"Q. Such being the situation of the vessels, what signal was given, if any? A. One whistle given by us. Q. Who sounded that whistle? A. The pilot. * * Q. Did you hear any reply from the Victory? A. No reply from the Victory. Q. What was done then? A. Still went on, keeping on the east side, and gave the second blast. Q. Did you hear any reply to that? A. No, sir. * * * Q. And hearing no answer to the second whistle, what did you do? A. Gave the third whistle. * * * Q. Did you hear anything then? A. Heard two whistles. * * Q. What did you do then? A. On hearing these cross-whistles we blew three times and put the ship full speed astern."

We will next take the pilot, though some disinterested witnesses were examined before he was put on the stand.

He says (p. 360):

"The captain went on the bridge and cleared the whistle—blew the steam out—and I took hold of the whistle after he was through with it and blew one long whistle for a dock whistle."

Again, 361:

"I blew one whistle just as I passed this black buoy, and after blowing the whistle, after one minute, I could get no response, I blew another one whistle. I got no response, but he ported his helm so I could see the whole side of his ship and the round of his stern, and I went along a few minutes. All at once the captain says, 'Pilot, what's that fellow doing? and I blew one whistle again and he answered with two, and I immediately blew the danger signals and reversed the ship full speed."

It will be observed in reviewing this testimony of the master and pilot, who were in charge of navigation, that they claim to have given three separate single blasts to the Victory and she did not answer the first two, but answered the last one with a double blast. Those men were in charge of the navigation, and if the Victory did answer those blasts, they certainly ought to have heard her answer. It will be observed, however, that Lyons, their helmsman, only heard two, and Ham also heard only two, and Schroder also heard only two, and nobody on that boat seemed to hear any reply to either of the first two of the Victory.

Now, bear in mind this discrepancy in their own crew as to the number, and the fact that even those responsible for the navigation of the Plymothian and supposed to be on the lookout heard no reply to their first two whistles, and with these facts in view, take up their outside testimony:

Etheridge, from the tug Commodore (R., 353):

"All I seen her do was to come out from the dock and

straighten herself down the river. She passed fifty or seventy-five yards from Buoy 9, and opposite Buoy 9 or thereabouts she blew the Victory one whistle, and, I suppose, in probably a minute, or probably not quite that long, she blew her one more; the Victory answered her with two. In a very little while afterwards he blew the Victory three whistles and reversed his engines. * * * Q. Did you hear the Plymothian blow her whistle as she left the dock? A. Yes, sir; heard her blow as she come out of the dock. Q. Just describe how those whistles were? A. One whistle at a time, clear and distinct. Q. You had no difficulty in hearing them? A. None whatever. Q. There has been something said about there being water or steam in the whistle. Do you recollect anything of the kind? A. No, sir. I was standing on the forward deck of the Commodore and heard them distinct myself."

Goodwin (page 373):

"Well, when he came out of the dock he came slow, and leaving the dock he blowed one long whistle. Q. That's the usual whistle? A. The usual whistle coming out of the dock. * * * Q. Now, did you hear any other whistles? A. I heard him blow just as soon as he hauled around the buoy and straighten up; he blew one whistle; of course, that was to the Victory. * * Q. Did you see or hear anything from the Victory? A. I saw the steam of two whistles, but never heard the whistles. Q. You saw the puffs of steam from the whistle, but never heard the sound? A. Never heard the sound at all. Q. What did the Plymothian do? A. Then, a little while after that—I suppose two or three seconds—he blew the one whistle again. * * Q. What did the Victory do then? A. The Victory blew two. I heard those. Q. Those were the first sounds you heard from the Victory? A. Yes, sir. Q. Well, what did the Plymothian do after the Victory blew those whistles that you heard? A. Well, now, he blew, as well as I can remember, three or four short blasts."

Again (page 382):

"Q. Now, as I understand, the first whistle you heard was the dock whistle? A. Yes, sir. * * * Q. You

didn't hear him blow his throttle-valve at all before that? A. No, sir, I don't remember it. Q. What was the first noise you heard from the throttle-valve of the Plymothian? A. I think he blew three whistles to the Pioneer. Q. That was the second? A. That was the second; that was before he got turned around good."

Again, page 387:

"Q. How long was it between the first whistle of the Plymothian and the puffs of steam from the Victory? * * * * A. I don't know; I think it was about three or four seconds. Q. How long after you saw those puffs of steam from the Victory was it before the Plymothian blew her second blast? A. About the same."

John I. Clark, p. 388:

"I was standing on the old dock when the Plymothian left the pier. She blew one long whistle leaving the dock and * * three whistles as a salute to the Pioneer which were answered by the Pioneer. Then she went down, keeping on the eastern side of the channel; blew one long whistle to the steamer Victory coming up. The Victory answered with two. The Plymothian, a little while afterwards, blew one more, which was answered by two, and the Plymothian blew three whistles and must have went back on his engines because her stern sheered to the westward, and that's all I know."

On page 390 he repeats this substantially and also admits hearing the danger whistles of the Victory.

Harrison, engineer of the Pioneer (page 394):

"As she got abreast she saluted the Pioneer with three whistles. That called my attention * * and a few minutes after that Captain Clark ran back and said, there is going to be a collision, and I said, why, and he said, because they blew cross whistles, and about that time the Plymothian blew one whistle (I didn't hear the first one) and the Victory answered with two, and a few minutes after that the loaded steamer Plymothian blew three whistles."

On page 395, in speaking of the whistles saluting the Pioneer, he says:

"When they blew the salute whistle *the first wasn't very loud*, but the other was distinct enough. *I suppose it was full of water or something*, but when she blew the pass whistles they was. Q. The pass whistles? A. Signal whistles. Q. They were clear? A. Yes, sir, clear and distinct. As to the first she blew, the three to the Pioneer, *the first wasn't so loud because the pipe was full of water.*"

Joseph M. Clark (page 400):

"We were below No. 9 buoy when the Plymothian came out from the wharf, and when she got abreast of me just below the buoy she blew three whistles to me and I answered the salute, and I didn't pay any attention then until she passed by, I suppose, 100 yards, and then he blew one whistle and I looked around out of the pilot house door to see what he was blowing at. I knew the Victory was coming up because I was waiting for her, and the Victory answered with two. I could see the whistles from the pilot house * * and shortly after that the Plymothian blew one again, a long whistle, and that was answered with two from the Victory * * and shortly after that there were three alarm whistles given by the Plymothian."

Wynne, p. 404. This man was really nearly two miles off, but appears to have had supernatural sight and hearing:

"I saw the Plymothian when she first left the coal dock, and the Victory, when she left, was then coming up below Craney Island light-house. The Plymothian sounded her one long blast of the whistle and waited, I suppose, an interval, as near as I can remember, about two or three minutes, which the Victory answered with two blasts of her steam whistle, and the Plymothian waited again about the same length of time and blew her another blast of the whistle, and the Victory answered with two, the same, and then the Victory was coming up with a strong flood-tide a pretty good gait, and the Victory blew her three or four blasts, what we call the danger signal, and the Plymothian answered them pretty close together."

Again, on page 406, in answer to a question from the cargo counsel, he repeats his statement that the Victory blew the danger signals first, but further on in his deposi-

tion a sudden light seemed to break upon him, and he took that back and said that the Plymothian blew the first danger signals.

As to the weakness of the Plymothian's whistle, the testimony of the Victory finds striking confirmation in that of Harrison, who says that the three whistles to the Pioneer were blown just as the Plymothian was abreast of No. 9 buoy, and that the first of those whistles was full of water and steam and very indistinct. Hence, to a vessel coming up the river, that whistle to the Pioneer may well have been mistaken for a response of two whistles. And Harrison in this respect negatives the testimony of Mardon and Henley that those whistles were all clear and distinct and that they had blown out their whistle before starting.

It must be remembered that there were a lot of tugs whistling around Lambert's Point, and also locomotives on the pier. This may account for the failure of the Victory's men to hear the Plymothian whistles if they were in any degree faint, and it may also be that Wynne, who was in Tanner's creek, mistook some of those whistles for whistles from the Plymothian.

The preponderance of testimony does not show that the Plymothian blew the first signal. It may show that the first signal which the disinterested witnesses heard came from the Plymothian, but that is quite another proposition. The proof in the case is that English steamers have whistles very inferior to American. These disinterested witnesses, with the exception of Wynne, were all immediately around the Plymothian as she passed buoy 9, and at that time the Victory was a mile off. They were not particularly interested in listening for signals, and it is entirely conceivable that the Victory may have blown a signal which they did not hear on account of its distance. When the Plymothian blew, however, she being right by them, it would attract their attention, and

then the second signal of the Victory, having had their attention attracted, would probably appear to them as the first that really came from the Victory. The testimony of the navigators of the Plymothian on this point is at issue with their own witnesses. They did not hear even the first whistles of the Victory, which a dozen disinterested witnesses around heard. They pretend that they blew three separate whistles from the Plymothian, when their own witnesses show that they blew only two. The conflict between them and their own witnesses is really very much greater than between the Victory evidence and their own witnesses; for as they and their own witnesses were in the same neighborhood, they ought to have been expected to hear in the same way and to hear the same thing.

The counsel for the Plymothian in their petition for a certiorari repeatedly state that both the District Court and the Appellate Court found as a fact, that the Plymothian gave the first signals and the Victory crossed them. In this they are mistaken. The Appellate Court on the contrary seems to hold that the Victory signalled first and that the Plymothian failed to respond. Thus:

"The Victory being in a comparatively narrow but deep channel, up which she was proceeding in full view of the Plymothian coming down the same channel, and on the east side thereof, continued her course without change, notwithstanding the failure of the Plymothian to respond to her signals, thus making a collision inevitable." (R., 500.)

They seemed to think, however, that the failure of a steamer to answer the signal of another steamer is a mere peccadillo, "an act of omission."

COMPARATIVE SPEED.

The testimony of the Victory is that the Victory slowed

down at Craney Island, and that they reversed some time before the collision.

The testimony of Lyons, the Plymothian's helmsman (p. 211), is that the Victory was coming at pretty good speed. Baird also says (p. 232) that the Victory was making decided speed at the collision. Wood (page 240) thinks she was going 5 knots at the collision. Mardon (page 266) thinks she was making 4 knots at the collision, and in the same breath that she came full speed till 300 yards off (p. 265). Brown, the Craney Island light-house keeper (p. 346), thinks that she passed Craney Island at the rate of 12 knots an hour, and kept it up; but their witness, Harney, who claims to have seen her at the same place, contradicts Mardon and Brown, and says she was going but five knots (R., 433).

The collision happened at buoy 7. Measurement will show that to be about 3,000 feet from the light-house, and yet Brown, without the aid of a glass, stood on that little squatty light-house and actually saw the propeller of the Victory as a small portion of its blade kicked out of the water. He proves, however, that the Victory did reverse, as he saw pieces of the blade when it did commence to back (R., 352).

Etheridge thinks that the Victory was moving eight or ten miles per hour, and that at collision she was moving five miles per hour (R., 355).

Henley (R., 362) thinks the Victory was going four knots at the collision.

Goodwin thinks the Victory, when he first saw her, was moving ten miles an hour (R., 375). However, he saw the Victory slacken speed (R., 384).

Joseph M. Clark (R. 402), says he doesn't think the Victory had much headway at the collision.

Wynne, the veteran mariner of Tanner's creek, says that the Victory was moving eight or ten miles an hour; that her headway was not checked at all until the collision

(R., 405). Herein he not only differs from Goodwin and Clark, who say that her headway was checked materially, but even from the crew of the Plymothian, who claim that she was going fast, but that at the collision she was only going from four to five knots an hour.

The witnesses for the Plymothian estimate her speed at from four to five knots an hour against the tide, which would mean at least seven knots through the water.

In considering this question of speed it is important to bear in mind that the tide made a difference of at least two miles an hour to each vessel, or four miles an hour in all.

In the case of *The Galatea*, 92 U. S., 439, it was decided:

"Where, in order to avoid a collision between two vessels propelled by steam, one going with and the other against the tide, it is conceded that when one should stop it is the duty of the one proceeding against the tide to do so, as her movements can be controlled with less difficulty than those of the other vessel."

"It is a comparatively easy matter for a ship steaming against a two-knot current to come to a dead halt without stopping her engines and without losing her steerage way. But a ship descending with the current cannot, by stopping her engines and without reversing, reduce her speed below two knots an hour; and when her speed is reduced to that limit she drifts, and her helm practically loses all control over her movements. These considerations afford an obvious reason for requiring that, in the circumstances to which the first part of the rule refers, the ascending shall give way to the descending vessel. In their Lordships' opinion, that part of the rule becomes imperative whenever an ascending ship approaching 'a point which does not afford sufficient breadth' has notice that if she proceeds she will be exposed to the risk of meeting a descending ship at or near that point. The second part of the rule is not, in their opinion, meant to come into operation, except in cases where the ascending ship has reached the point of danger and has actually begun to navigate the contracted passage

before any such notice was conveyed to her." *The Diana* (1894), A. C., 629.

Hence under this rule it was incumbent upon the Plymothian to stop in a shorter space than the Victory could stop in, and yet the preponderance even of her own testimony shows that she was not entirely stopped at the moment of collision. It is true that some of her witnesses claim that she was actually moving backwards, but a critical examination of their own testimony will show that she must have had some headway at the time of collision. One of her witnesses goes so far as to claim that the boat commenced to back the very instant that the engines commenced to back; but this shows the absurdity of their testimony on that subject.

Her wheelsman, Lyons, (R., 211) expressly says that he couldn't say whether she was making sternway, but that she was making no headway.

Hendema, her other helmsman, says, at page 226, that she might have been going a little ahead at the collision, but he couldn't say how fast, and on page 230 he again says in answer to a question of his own counsel:

"Q. Was she going ahead or not? A. Yes, sir, going ahead. Q. You think she was making a little headway at the time of collision? A. Yes, sir."

Baird, page 232, only claims that she was still at the time of collision.

Wood, page 239, says practically the same.

Mardon, her master—page 265–267—says that her headway was entirely checked and that she *may* have been making a little sternway.

Etheridge (R., 355) thinks that she was going back, certainly not forward.

Henley, her pilot, (R., 362) only claims that he had no headway, but does not claim any sternway.

Goodwin (R., 374-5) says that she was lying perfectly still at the collision, but does not claim any sternway.

John I. Clark (R., 388) says:

"Q. Did you notice the headway of the Plymothian at the time of the collision? Was she going ahead? A. I don't think the Plymothian was going ahead but very little, if any—not much."

Harrison (R., 395) thinks that she wasn't going ahead at all, but does not claim any sternway.

Joseph M. Clark (R., 402) says:

"Q. She was making very little headway at the time? A. Yes, sir."

Wynne, the long ranged Tanner's creek pilot, (R., 405) says:

"I wasn't close enough to see, but as far as I could see her headway was checked."

When two vessels are approaching each other, just as when two railroad trains are passing each other, the question of which is moving ahead and which is moving faster is a very uncertain one. Witnesses looking at it unconsciously transfer the speed of one to the other, and such testimony is very unreliable.

The best proof on this subject is circumstantial evidence, and can be gathered from the appearance of the injuries inflicted. This proof in this case shows that it was the Victory which was stopped and that it was the Plymothian which did the damage by forging across her stem. The stem of the Victory itself was not crushed in, and yet just behind the stem there was a large hole in the starboard bow of the Victory opening inwards, and right opposite, a large bulge on the port bow, pressed outwards, and a large piece of iron from the Plymothian lodged up against this bulge.

This is conclusive that the force exerted was a force

from the west to the east at right angles to the Victory, and not a force from the Victory forward.

If a bullet is found embedded in the side of a thick plank, leaving a plain hole where it entered, and causing the plank to bulge or splinter where it lodges on the opposite side, the natural inference would be that the bullet had penetrated the plank, and not that the plank had fallen against the bullet.

The pleadings of the Plymothian themselves only claim that "her headway was entirely checked at the time of collision." The fact that the Victory had some headway on her, if she had any, was excusable, because she had the tide behind her. The fact that the Plymothian had headway is inexcusable, because she had the tide dead against her, had, according to her own testimony, just started and gotten up no speed, and hence ought to have been able almost to have stopped in her tracks with the assistance of the tide, if her engines had been reversed for one-fourth or one-eighth of the time that her fabricated log falsely claims.

THE VICTORY'S COURSE.

Here the evidence of the witnesses on behalf of the Victory is concordant that she was coming up along the eastern side, and kept practically on that course until the change made to avoid the collision. Those of the Victory's crew who profess to know anything about it, all testify to this, and also the disinterested witnesses, Pratt, Page and Martin. On the other hand, it is impossible to judge what the theory of the Plymothian's side is on this question for their evidence is discordant.

The first paper on their part which touches this question is the answer to the Victory libel, and this states that the Victory kept up the centre of the channel until her helm was put hard-a-starboard. This same statement is repeated in the answer to the cargo libel made by the Ply-

mothian, in the petition of the Plymothian for limitation of liability, and in the petition of the Plymothian filed in the Victory proceedings for limited liability; hence the pleadings positively commit them to the statement that the Victory kept a practically straight and unchanged course right up the centre of the channel until just before the collision; but when we come to analyze their evidence we find it in charming inconsistency with their pleadings and the different witnesses with each other.

Their first outside witness was Brown, the Craney Island light-house keeper. He testifies that the Victory passed Craney Island light as close to the western bank as she could get without going aground, and kept this course for half a mile (R., 346, 348–9).

Their next witness, Etheridge, testifies that the Victory was as near mid-channel as she could get (R., 354).

Their next outside witness, Goodwin, testifies that the Victory was on the west side of the channel at Craney Island, but testifies also that she never ported (therein, flatly contradicting pilot Henley), but kept a straight course until she starboarded (R., 375, 377).

Their next disinterested witness, Harrison, testifies that the Victory was near mid-channel (R., 399).

On the other hand, Schroder, of their crew, testifies that the Plymothian was going down close on the starboard side of the channel, and that the Victory was dead ahead (R., 203).

If the Plymothian was on the starboard side and the Victory was dead ahead, the Victory must have been on the starboard or eastern side, too. They cannot possibly put the Plymothian on the starboard side and the Victory in mid-channel, or the west side, and get them dead ahead.

Their captain, Mardon, testified that the Victory was near mid-channel at Craney Island, and kept that course (R., 264, 270–1). There is one remarkable statement

made by Mardon in this connection which demonstrates either that the Victory was on the starboard side, as we contend, or that the Plymothian was in mid-channel.

He says that at the collision moment each of the two vessels had changed her course two or three points. If this is so, then each must have been equi-distant from the bank, and one of his other statements must have been untrue. Either the Plymothian was in mid-channel or the Victory was on the east. In fact, this will show that the Plymothian must, if anything, have been furthest west than the Victory, for she was moving against the tide and was a shorter ship, and therefore would turn quicker than the Victory (Goodwin, R., 382).

But it was reserved for Henley to cap the climax on this subject. He testifies that the Victory was in mid-channel at Craney Island light (R., 364); but he also testifies that after his second whistle the Victory ported so much as even to show him the round of her stern (R., 361). As he had previously testified that the Victory was about at Craney Island light when he blew his first whistle, this testimony, if true, would show that this supposed porting must have taken place after she passed Craney Island light, and yet Goodwin, one of his witnesses, swears positively that the Victory never ported after passing Craney Island light, and swears this not only positively, but repeatedly. And Henley's companion, Mardon, saw nothing of this supposed porting.

This pretense of Henley's, in order to make out a case of port and port, is inconsistent with all the rest of his evidence. The fact is, that the natural conformation of the channel required the Victory, even without leaving the centre of the channel, to port a little about off the red buoy just below Craney Island light, and Henley attempted to turn this porting to account, although this porting must have happened, according to his own testimony, before he

blew his first whistle, and not after he blew his second, as he pretends, and his deposition practically admits this (R., 364).

Hence, we may argue that the preponderance even of the Plymothian's witnesses themselves, shows that the Victory was at no time west of the mid-channel line, and there is much even in that testimony to show that she must have been on the eastern side, as claimed by us.

THE PLYMOTHIAN'S COURSE.

The evidence of the Victory shows that the Plymothian had gotten over in the western part, thus making a case of starboard to starboard. The probabilities, at least, are in favor of this hypothesis. The Plymothian was lying on the north side of the north pier at Lambert's Point. North of her was a breakwater, which, Mardon says, neutralized the effect of the tide until the vessel had passed beyond it. We may assume also that the tide is the swiftest in the deep water channel and gradually gets swifter as you approach it, although it has some current even over the flats. The Plymothian was 260 feet long. She started out from the north side of the pier under helm slightly aport, according to her master. Hence the bow would feel the effect of the tide before the stern, which, on account of the wharf, could not be swept up, hence the first effect of the tide, until the bow had reached a point 260 feet in the channel, at which time the stern would have just cleared the wharf, would be to sweep the bow up stream and to necessitate a long reach in turning. In addition, the bow being nearer the deep water than the stern by 300 feet, would constantly feel the current strongest, and hence it is a matter of common knowledge and common sense that a vessel which had not gotten up her headway and had a two-knot current on her broadside could not possibly

turn sharp around Buoy 9. She must have taken some time to turn.

It is also observable by a glance at the chart that the line of the channel, after passing buoy 9, is a little westerly of north, and does not proceed straight to buoy No. 7. Between the two buoys there is a lump or bulge. Hence, if the Plymothian, after straightening her course down the middle of the river, was anywhere near mid-channel, and if the Victory was then about mid-channel just south of Craney Island light, the two vessels would present their starboard bows to each other. If the Victory was on the east side of the channel, there would be quite an angle between the two vessels, each being on the starboard bow of the other; hence even if the Plymothian was not on the western side of the channel, but was at any time in her swinging near mid-channel, as she must have been, with that tide, she would have been on our starboard bow, and would have justified our giving her two whistles and holding our course.

The natural facts, therefore, would show that the Plymothian could not have hugged the east bank as she claims, but must have gotten at least as far as mid-channel.

Here, too, the testimony of the Plymothian is in hopeless conflict. The statement in his pleadings, commencing with the answer to the Victory libel is (See paragraph 7):

"That in the due prosecution of her voyage she passed close to the westward of buoy No. 9 under a port helm, *it having been previously put hard-a-port.*" (R., 442.)

This answer was the first paper filed by them and was sworn to by Allen Mardon, master. The statement in his answer to the cargo libel is *verbatim* the same. Allen Mardon swears to this also. These two papers were filed before their evidence was taken.

The next paper filed is their petition for a limited liability. When that was filed their evidence had been taken.

It merely states that they passed buoy 9 under a port helm, but says nothing about the previous hard-a-port. (R., 8.)

Their next paper was their answer to the Victory petition for limitation of liability, and is like the last. (R., 11.)

Coming to their depositions, their first witness, Ham, who professes to know anything about this, says that when they went out they went straight out from the pier across, and he testifies positively that the order given on the Plymothian just before the collision was port and not hard-a-port, and that hard-a-port was not ordered until after they struck. (R., 189, 194.)

The next witness, Schroder, says that the Plymothian was under a port helm when the danger signals were given—that is, she had ported even previously to the danger signals. (R., 203.)

Their next witness, Lyons, testifies that they left the wharf under port helm, but when they got out *in the middle a way*, it was to hard port, then the helm was steadied, then the helm was put to port again and then the order came hard-a-port, which was continued to the collision. (R., 209.)

This shows that even before the hard porting their ship was under a port helm.

Again, Lyons says that this order to port was given just after the first whistle, which, according to the preponderance of their own testimony, was blown about even with buoy 9. (R., 215.)

The next witness, Hendema, testifies that they left the wharf under a port helm; that after they got some distance it was hard ported; that he heard some whistles and steadied; that then he ported, and then hard ported. He is in conflict with the first helmsman, but he, too, shows the vessel was under a port helm before he hard ported, which was given professedly to avoid collision (R., 219).

Their next witness, Wood, says that they went out with

the helm hard-a-port until they got around the buoy, and he knows this because he looked at the helm. He says immediately afterwards that they steadied, and then again says it looked to him all the way hard ported (R., 247, 250).

Mardon says that they left the wharf with helm a-port; that when they got close to buoy 9 they put it hard-a-port, and passed that buoy in 20 or 30 feet; that when they straightened down the river the helm was steadied, but he doesn't say how long it was steadied and does not mention the porting which his helmsmen both mentioned. On the contrary, he dodges that question as follows:

"Q. And under helm amidships? A. The helm was working as required."

And he dodges it again when speaking of the time when he blew his three whistles, he says:

"Q. In the meantime how had your helm been put? A. The helm had been put hard-a-starboard. Q. Had it been changed from steady before that? A. We had been steering down the eastern side of the channel until I saw a collision was likely, and then we put it hard-a-port when we saw him come up on a starboard helm."

And further on, he says that when the whistles were blown the helm was ported a little while, and then when the last whistles were blown and the engines reversed it was hard ported.

Henley, however, says that they left the dock with helm a little to port, then put it hard-a-port, then straightened (R., 360).

Of their disinterested witnesses, Etheridge says that they left the pier under a port helm, but Goodwin says that he followed the Plymothian right out behind her, where he was in the best position to see her helm, and that she left under helm hard-a-port (R., 353, 377, 381).

John I. Clark, who was on the pier, and also in position to see her as she went out, says that her helm was hard-a-port. (R., 391.)

The above summary shows that their evidence is in irreconcilable conflict as to the helm under which they left the wharf, but we may assume from their own evidence that the Plymothian, after passing buoy 9, was moving under helm partly a-port until she gave her danger signals, at which time she put it hard-a-port.

Now, bear this in mind in connection with the statement of her navigators, that she was proceeding down within 30 or 40 feet of the eastern buoy line. Measurement of the chart shows that from buoy 9 to buoy 7 is about 2,300 feet, or nearly half a mile, and yet they come seriously into court and ask us to believe that they started within 40 to 60 feet of the eastern channel line and moved that way for half a mile with helm a-port, and did not run aground!

A vessel proceeding against the tide, especially one only 260 feet long, obeys her helm very quickly, and if the Plymothian was, as her master contends, within forty to sixty feet of the bank, and moving under helm always practically a-port, she would have gone outside of the buoy line in fifty yards.

They admit that the collision occurred near buoy No. 7, with the buoy on their starboard bow, and that it never got on their port side until after the collision; hence, whether they were to the west of buoy 9 or to the north of it, they at least were not to the east of it. How could they have proceeded for that distance under a port helm and have kept always to the westward of buoy No. 9?

What is the explanation of this testimony, if true? A vessel bound north when under port helm necessarily moves from west to east; hence, if the collision occurred with buoy 7 on their starboard bow, after they had been slightly under port for some distance and hard-a-port for four minutes, according to their estimate, they must have been on the western side of the channel when they started that movement. They must have been well over to the western

side of the channel when they commenced their porting; and this confirms the natural facts of the case, when we consider that in coming out the tide must have swept them well across the river, and it also confirms the testimony of the Victory's crew and of the men from the Princess.

Their own disinterested testimony does not bear them out in their statement. It is true that some of them make her pass very near to buoy 9, and the likelihood is that she did in going out leave buoy 9 very close to the north of her; but it is impossible to suppose she ran for buoy 9 and then swung sharp around, like a buggy around a street corner, and passed within the same distance, leaving the buoy to the east. If they passed buoy 9 close to the north of her they must have swung out at least her own length in the channel, which is 250 feet. Some of her own witnesses placed her as far out as mid-channel; and when they get her out in mid-channel, as she goes out swinging into mid-channel, and the Victory is coming up heading for buoy 9, a glance at the map will show that they presented starboard to starboard and created the situation calling for two whistles. If she steers as other ships, she must have gone out at least as far as this, and then having gotten out this far she should have kept down on that side of the channel, especially when she saw another steamer coming up on the course which the Victory was pursuing; which was a proper manœuvre in the Victory under such circumstances, seeing a vessel coming out from Lambert's Point which he knew had to move out into the channel a distance of 350 yards at least from Lambert's Point to buoy 9, and which he knew had to have some space to swing around. The Victory under such circumstances should have steered for buoy 9 along the eastern side, giving the entire western side of the channel to the Plymothian in which to have turned around, and to have proceeded about her business. Had he gone over to the west side, not knowing exactly

what kind of a vessel the Plymothian was, nor how she steered, he would have embarrassed her in her swinging.

SUMMARY ON THE FACTS.

1. The Victory was not in fault in taking the eastern side of the channel.

The lower courts in this respect held her to violate a rule which is not in existence.

2. The Victory was not in fault on the score of whistles. Although the District Court held on the facts that the Plymothian gave the first signals, the Circuit Court of Appeals seemed to think otherwise, and neither court blamed her on this score.

3. She was not in fault for her handling of the engines. She had slowed down about when passing Craney Island, and she stopped and reversed as soon as the eccentric movement of the Plymothian showed the necessity for it.

4. She was not in fault for giving two whistles, for if they bore on each other's starboard bows, the port-helm rule did not apply. The District Court held that the port-helm rule did not apply; the Appellate Court confused it with the starboard-hand rule.

5. The Plymothian was in fault for having an inefficient lookout, who did not hear whistles from the Victory that mere casual observers heard, and did not see the schooner in front of her until the last moment.

6. Under the decision of the Circuit Court of Appeals holding that the Victory signalled first, the Plymothian was at fault for crossing the signal, despite the fact that it was "an act of omission."

7. The Plymothian was in fault in not backing earlier (Beryl, L. R., 9 P. D. 137).

If these positions are true, the Victory was blameless, and the Plymothian was solely responsible. At the worst, the fault of the Plymothian was as great as that of the Vic-

tory, and the latter did not deserve the harsh adjectives in the opinion of the Circuit Court of Appeals based upon a misconception of the law.

THE HALF-DAMAGE RULE.

But even if the Victory was much more to blame than the Plymothian, there is no warrant of law for the action of the Circuit Court of Appeals in confiscating the Victory's bond and holding the Plymothian only for the excess.

The counsel for the Plymothian argue that the effect of this decision was to place a much greater burden on her than the Circuit Court of Appeals intended, and they proceed to figure their loss as almost equal to the Victory (Plymothian petition, p. 16). They arrive at this result by taking into account the damages to the Plymothian, but not taking into account the damages to the Victory. An easy calculation will show that the result makes a difference of $10,000 in round numbers, to the Victory—in other words, the Circuit Court of Appeals, in a case where both vessels were to blame, and where, under the universal practice of this court, the regular form of decree is a decree for half-damages against each, with a mere remedy over in case of deficiency, has made the innocent owners of the Victory pay about $10,000 for which the owners of the Plymothian were responsible and for which there was an ample bond on file. Even if the rule of half-damage is applied, the Victory having the greater value, will have to pay a larger amount than the Plymothian. This result ought to be inequitable enough, if there is anything in the maxim that "equality is equity" without taking all and thereby benefiting the other vessel to that extent.

The decision of the Court of Appeals laying down this novel doctrine was rendered without the advantage of previous argument. It was a question not involved in the lower court. Not an assignment of error by either of the

parties litigant raised it. The most enthusiastic dreams of their advocates never once prompted the insertion of a line on the subject in the briefs. The first that anyone knew that such a departure was contemplated was the filing of the opinion; and when petitions for rehearing were filed asking an opportunity to discuss the question, they were not granted. It has not given satisfaction even to the owners of the Plymothian, the ones most immediately benefited by it. In their brief filed with their petition for a certiorari in this court, pages 2 and 3, they argue that the rule of an equal division of damages is well settled, and that the action of the court in this respect was an error.

We may assume that their position will be the same on final argument. They will hardly ask a certiorari on the ground that the lower court erred in this respect and then, when the certiorari is granted, argue that the lower court was right.

As far as the shippers are concerned, they have no interest in the matter. If they get all of their damages, it is immaterial to them who pays them. It is somewhat embarrassing, therefore, to know who our antagonist is on this point, but as it has been decided by a court which on admiralty questions is a court of last resort, we cannot ignore it.

In the opinion (R., 504) it is admitted that the general rule, almost universal, is to divide the loss equally; but the court goes on to say that this rule is not inflexible; and to sustain this proposition, it cites the *Max Morris* decision, 137 U. S., 1, and it then goes on to speak of the application of an equal division of damages as *rusticum jus.* (R., 504.)

The best discussion of this question as an abstract proposition is found in chapter 6, p. 125, of Marsden's work on collision. He reviews the old sea laws on the subject and the history of the decisions in England. It can hardly be

considered a profitable task to go through these old sea laws. They were as primitive as the vessels which operated under them.

It will appear from this review that the rule of division of damages originated in cases of inevitable accident, not in cases where there was mutual fault, and in many it applied also to the cargo. (4 Black Bk. Adm. 283-4, 435.) If they are to be followed, why has not this court followed them in those cases instead of deciding, as it has often decided, that in cases of inevitable accident or where the loss is inscrutable, it rests where it falls? It was to this class of cases, holding vessels and even cargoes responsible to outsiders for accidents which they could not prevent, that the term *rusticum jus* was originally applied. It is to this class of cases, in part, that the term is applied by *Chancellor Kent* in the citation. To such class of cases it was well applied.

But, if it is a *rusticum jus* to divide damages equally and thereby have at least some settled rule, what Latin is strong enough to characterize the judgments which would be rendered if all the various judges in the world who have admiralty jurisdiction were allowed to divide damages according to their idea of the degree of fault? Such a loose system would certainly put us at sea.

There is no warrant in the decisions of this court for the assertion that the rule of equal division is not inflexible. There is none in the *Max Morris case*, the only decision which they cited. It came as far from deciding any such proposition, as the *Britannia case*, cited in a previous part of their opinion to support the doctrine that the International Rules governed in local waters, came from that proposition. The *Max Morris case* was not a collision case at all. It was an action for personal injuries The question at issue in the case was whether the common law rule of contributory negligence applied, and this court in deciding the case as it did, not only expressly placed it upon the

ground that it was not a collision case, but in the conclusion of its opinion even said that as to personal injury cases the question whether to divide the damages equally or in any other proportion, was one which they expressly reserved. In other words, that case merely decided that a man injured upon a vessel could recover some damages, even though himself in fault, and expressly refrained from deciding how to estimate them; and possibly when this decision is cited for such a proposition as an unequal division of damages in a collision case, the astonishment must have been very similar to that described by Bynkershoek on a certain occasion when he attempted to persuade the Supreme Court of the Netherlands, of which he was a member, to divide the loss in such a case proportionate to fault and not equally. He describes their reception of his proposition as follows:

Memini, me senatore et de geometrica proportione perorante, reliquos senatores obstupuisse atque si Jovis ignibus icti essent.

It is agreed that the first case in this court which passed upon this question was that of the schooner *Catherine*, 17 How., 170. If an examination of the decisions of this court will show that this rule has been treated as the settled, inflexible rule, and not as a mere rule of convenience, then it is quite useless to look into ancient codes or personal injury cases.

The cases in this court where the damages have been equally divided are too numerous to review. Most of them are collated in the *Max Morris* decision. In most of them the court has simply divided the loss equally without comment, treating it as a matter of course. The only cases, however, in which they have discussed the rule, have stated it as inflexible and not as elastic.

"If both vessels were in fault, then the damages, *under the rule applied in this court, must* be proportioned between the offending vessels."

The Morning Light, 2 Wall. at p. 557.

"Even flagrant fault committed by one of two vessels approaching each other from opposite directions, does not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent collision.

"Damages equally divided in a case of collision on an application of this rule."

The Maria Martin, 12 Wall. at p. 31.

"If both vessels are in fault then the damages *must be* equally proportioned between the offending vessels."

The Continental, 14 Wall. at p. 355.

"In the common law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other, and the plaintiff who has the selection of the forum in which he will litigate, cannot complain of the rule of that forum.

"It is not intended to say that the principles which determine the existence of mutual fault in which the damages are divided in admiralty, are precisely the same as those which establish contributory negligence at law that would defeat the action. Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially."

Atlee vs. Packet Co., 21 Wall. pp. 365-6.

The Sunnyside, 91 U. S., at p. 216.

"Tested by these several considerations the court here is of the opinion that both vessels were in fault and that the damages and the costs in both of the courts below should be equally proportioned between the two vessels *as prescribed by the decisions of this court.*"

The America, 92 U. S., at p. 438.

"Disasters of the kind occur from different causes and

under very different circumstances, and the rules of admiralty law applicable in the determination of such controversies vary to meet the varying circumstances which give rise to the accident. Judicial experience has given no better guide than that furnished by Lord Stowell, than whom no abler judge ever presided over the admiralty court of the parent country. Speaking of such disasters, he remarked to the effect that there were four possibilities under which an accident of the kind may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to fall, the rule being that the party not injured is not responsible to the losing party in any degree. Secondly, a misfortune of the kind may arise when both parties are to blame; as where it appears there has been a want of due diligence or of skill on both sides; and he adds that in such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by both. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burden. Lastly, he remarks, that it may happen from the fault of the ship which ran the other down; and in that case the injured party is entitled to an entire compensation from the other. *The Woodrop*, 2 Dodson, 85.

Freedom from fault is a good defence in a cause of collision against a claim for damage promoted by an injured party, and it entitles the promoter of such a suit to full compensation from the opposite party, if proved to be guilty. Where neither party is in fault, and the damage was the result of unavoidable accident, the rule that the loss must be borne by the party on whom it fell, is one of universal application. *The Shannon*, 1 W. Rob., 470; *The Itinerant*, 2 id. 243; *The Locklibo*, 3 id. 318; *The Morning Light*, 2 Wall. 560.

Under the second of the foregoing rules, when both vessels are in fault,—the sums representing the damages are added together, and the amount is equally divided between the parties; and that rule prevails in all cases where there is mutual fault, even though one of the vessels may

have been much more in fault than the other. Fault being imputed to both vessels, and the charge being proved, the inquiry which was most to blame is immaterial, as the damages must be divided between the two, according to the rule provided in the admiralty courts. *Vaux vs. Sheffer*, 8 Moore P. C. C., 87.

Attempt was made in the Court of Sessions in Scotland to establish an exception to that rule; and the court finding, in a case where both vessels were in fault, that the greater share of the blame rested on one, decided that the owners were liable for two-thirds of the damage. Maude & P. on Ship., (3rd ed.) 470; *LeNeve vs. Shipping Co.*, 1 Shaw's Cas., 378.

Prompt appeal was taken from that decree to the House of Lords, where the decree was reversed, upon the ground that the true rule was the one laid down by Lord Stowell, that, where a misfortune of the kind happens from the want of due diligence or skill on both sides, the loss must be apportioned between them, as having been occasioned by the fault of both. *Hay vs. LeNeve*, 2 Shaw's H. of L. Cas., 400; *The Washington*, 5 Jur. 1067.

Both vessels being in fault, the positive rule of the court of admiralty, says Lord Denman, requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. *DeVaux vs. Salvador*, 4 Ad. & El. 431.

Innocent parties in cases of the kind are entitled to full compensation, but the admiralty rule as between wrong-doers is that the combined amount of the damage shall be divided between the owners of the two offending vessels. Text-writers of standard authority, as well as courts, have adopted the same rule, and hold that, where both vessels are in fault, the loss must be apportioned between them, as having been occasioned by the fault of both. Maclachlan on Ship. (2d ed.), 286; 1 Pars. on Ship., 527; Williams & Bruce, Prac., 71.

All of these writers, and many others, lay down the rule, that, where both parties are to blame, the loss must be apportioned between them; and the authors last cited say that the rule is founded upon the principle which, from ancient times, has been applied in the admiralty court, that damage

by a common fault shall be considered as a common loss. *The Lima*, 4 Jur. N. S., 147; *The Aurora*, Lush. Adm., 329.

Strict justice would require, said Dr. Lushington, that the burden of making good the loss should fall upon the two delinquents in proportion to their delinquency, but in practice the proportion is impossible to be ascertained. Such a rule, if adopted, would be utterly impracticable, for the reason that the court cannot apportion the loss according to the *quantum* of neglect or culpability on the one side or the other; hence equal apportionment is the universal rule where there is mutual fault, even though the fault on one side may be much greater than the fault on the other. *The Milan*, Lush. Adm., 401; *The Linda*, 4 Jur. N. S., 147."

The Atlas, 93 U. S., 312-14.

"Both vessels having been in fault, *the settled rule* in this court is that the damages must be divided."

The Stephen Morgan, 94 U. S., at p. 604.

"The rule of admiralty in collision cases, as we understand it, is, that, where both vessels are in fault, they must bear the damage in equal parts—the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount, of course, is one-half of the difference between the respective losses ascertained. When this resulting liability of one party to the other has been ascertained, then, and not before, would seem to be the proper time to apply the rule of limited responsibility, if the party decreed to pay is entitled to it. It will enable him to avoid payment *pro tanto* of the balance found against him. In this case the duty of payment fell upon the 'North Star,' the owners of which have not set up any claim to a limit of responsibility. This, as it seems to us, ends the matter. There is no room for the operation of the rule.

The contrary view is based on the idea that, theoretically, (supposing both vessels in fault) the owners of the one are liable to the owners of the other for one-half of the damages sustained by the latter; and, *vice versa*, that the owners of the latter are liable to those of the former for one-half of the damage sustained by her. This, it seems to us, is not a true account of the legal relations of the parties. It is never so expressed in the books on maritime law. On

the contrary, the almost invariable mode of statement is, that the joint damage is equally divided between the parties; or (as in some authorities), it is spoken of as a case of average. Thus, Lord Stowell says: 'A misfortune of this kind may arise where both parties are to blame, where there has been want of due diligence or of skill on both sides; in such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them.' *Woodrop-Sims*, 2 Dods., 83. This statement of law was adopted in the text of Abbott on Shipping pt. iii. c. 1, sect. 2. It is also adopted by Mr. Bell in his Commentaries on the Laws of Scotland, vol. i., 580, 581, who remarks: 'By the maritime law this is a case of average law or contribution, in which both ships are to be taken into the reckoning, so as to divide the loss.' It is also adopted in the latter text-writers. See Maclachlan on Merchant Shipping, 274. In Hopkins on Average, p. 189, it is stated thus: 'If, as the result of cross-actions in admiralty, both vessels be found in fault the rule of the court is, to add the damages, losses, and the costs of the two ships together, and to divide the joint sum, in moieties, and decree each vessel to bear an equal portion.'

If we go back to the text of the law, in the Rules of Oleron, following in the laws of Wisbuy and other laws, we find it expressed in substantially the same manner. The case is supposed of a ship coming into port negligently managed, and striking a vessel at anchor in an improper position, so that both are in fault and both are damaged. The Rule says: 'The damage ought to be appraised and divided half and half between the two ships, and the wines that are in the two ships ought to divide the damages between the merchants'. 1 Pardessus, Collection de Lois Maritime, 334; Cleirac, Us et Coutume de la Mer, 55; Sea Laws, 141; 1 Peter's Admiralty Decisions, App. xxiii.

In Jacobsen's Laws of the Sea it is said: 'If the damage is done reciprocally, such damage is apportioned in common between the parties'. The French Ordinance of 1681 expresses the rule in exactly the same way: 'The damage shall be paid equally by the ships which have caused it and suffered it.'

Valin, 1, iii; tit. vii, art. 10. On this Valin remarks: 'Whenever damage by collision is adjudged common average between two ships, the decree is that the costs of suit and the appraisement of the damage shall be equally borne in common, to effect which they are made into one mass, with a calculation of the average'. Emerigon, who had great experience as an admiralty lawyer and judge, says, upon the same article: 'The damages sustained by both ships are appraised and made into one mass, which is equally divided'. Assurances, c. 12, sect. 14, par. 3. Boulay-Paty, commenting on the Code de Comerce, art. 407, which relates to the same subject, says: 'We conclude, then, that, after due regard is had to the character of the damaged parts of each ship, the injury and damage which they have sustained and the appraisal thereof, being added together in a single mass, must be divided so as to be equally borne by each of the ships which have been struck'. Droit Commercial, vol. iv, 497.

In this country the same mode of expressing the law has always prevailed. The first case in which the question came before this court was that of *The Catharine vs. Dickinson*, 17 How., 170, in which both vessels were adjudged to have been in fault; and the Court, by Justice Nelson, adopted the admiralty rule as it had been administered in the District and Circuit Courts. Justice Nelson said: 'The question, we believe, has never until now come distinctly before this Court for decision. The rule that prevails in the District and Circuit Courts,we understand, has been to divide the loss'; and he cited the case of *The Rival*, decided by Judge Sprague (Sprague's decisions, 160), and the leading English decisions on the subject. Subsequent decisions have invariably used the same language. *Owners of the James Gray vs. Owners of the John Frazer*, 21 How., 184; *the Washington and the Gregory*, 9 Wall., 513; *the Sapphire*, 11 id., 164; S. C. 18, id., 51, 56; *the Alabama and the Game Cock*, 92 U. S., 695; *the Atlas*, 93 id., 302, 313; 3 Kent, Com. 231".

The North Star, 106 U. S., 20, 22.

Even as late as *the Beaconsfield*, 158 U. S., 303, this rule is assumed as settled.

It is, therefore, submitted that whatever the rule may be as to personal injury cases, it is inflexible as to collision cases, and cannot be changed except by a judicial somersault which will unsettle a doctrine as firmly settled as any in the law.

It is usually considered sufficient to cite one decision of this court in settlement of a proposition. We are fortunate in this case in being able to cite a score.

Nothing short of judicial legislation can change the rule, and this court in its recent opinion on the Anti-Trust act has given in emphatic terms its present opinion on judicial legislation.

THE PROVISIONS OF THE PLYMOTHIAN'S BILLS OF LADING AS AFFECTING THE VICTORY.

Some of the bills of lading of the Plymothian contained the negligence clause and also the flag clause. A question between the Plymothian and the shippers is whether these exemptions protect the ship. The interest of the Victory in this question is an indirect one. If those provisions are held to be invalid, there can be no question affecting the Victory to arise; but if they are held to be valid, then it is respectfully submitted that the liability of the Victory should not be thereby increased. If the shippers have chosen to disable themselves by contract from collecting the value of their cargo out of the Plymothian, it would certainly be inequitable to allow this to impose a greater liability upon the owners of the Victory. In other words, we submit that the Victory is entitled to a credit as against the cargo to the full amount of the Plymothian's bond, even though the cargo owners by reason of their contract with the Plymothian have prevented themselves from collecting the balance out of the Plymothian.

Nothing has occurred so far to indicate whether the opposing interests will question this proposition or not, but

whether they do or not, it is submitted that any other result would be highly inequitable and against the current of authority.

The only possible principle upon which such a contention could be based is the old proposition that each is liable for the whole loss, and that there is no contribution among wrong-doers. This latter doctrine that there is no contribution among wrong-doers, originated in cases of wilful torts like trespass; the better opinion is that it never applied to cases that were termed mere *delicts*, that is, mere unintentional injuries to others—it was based upon the theory of conspiracy in which there must have been an evil intent involved.

"As between wrong-doers themselves, one who has been sued alone and compelled to pay the whole damages has no right to indemnity or contribution from the other, for the nature of the case is such that he must be presumed to have known that he was doing an unlawful act. Otherwise, where the matter is indifferent in itself, and the wrongful act is not clearly illegal but may have been done in honest ignorance, or in good faith to determine a claim of right, there is no objection to contribution or indemnity being claimed."

Pollock on Torts (London ed., 1887), 170–1.

See especially the note to *Kirkwood* v. *Miller*, 73 Am. Dec. 147–8, and cases cited.

It is submitted that this doctrine of the common law has never been adopted in the admiralty. The admiralty rule originated in the law of average, not the law of torts. The language of the decrees which this court has directed in cases where third parties have recovered against two negligent vessels in collision, shows this. The decree does not go as a general decree against the two, but goes as a separate decree for half against each, with a mere remedy over against the more valuable vessel if the less valuable one is not sufficient to pay her quota.

The Alabama and The Game Cock, 92 U. S., 695.
The Sterling and Equator, 106 U. S., 647.

That the innocent third party has not an absolute unqualified right to proceed against one vessel alone without the right of contribution as between the two vessels, sufficiently appears by the 59th admiralty rule of this court, adopted October term, 1882, 112 U. S., 743.

Hence, even if the decree went against the Victory for any part stipulated away by the cargo owners, the Victory would have the right, as between herself and the Plymothian, to proceed against the Plymothian for reimbursement to the extent of the Plymothian's bond, which would bring about the same result.

This principle is well illustrated by the case of *Chartered Bank vs. Steam Navigation Co.*, L. R. (10 Q. B. D.) 521.

There certain goods were shipped on the *Crown Prince* under a bill of lading containing the negligence exemptions. She came into collision with the *Atjeh*, both ships being owned by the same company. The shippers sued the owners. The court held that if the vessels had been owned by different parties the measure of recovery would have been half against each ship, and that there was no reason why the rule should be differently applied. They therefore gave judgment for one half the loss on the ground of the negligence of the *Atjeh*, and exempted the owners for the half due to the negligence of the *Crown Prince*.

The same principle is applied in the case of the *Viola*, 60 F. R., 296.

In that case the District Judge (Brown) held that the *Harter Act* was not intended to change the relations between the shippers of one ship and the owners of the colliding ship, and that although the owners under the terms of the *Harter Act* could not recover against their own ship, that did not enlarge their measure of recovery against the other,

and he charged the other ship simply with the amount which she would have had to pay if the ship on which the goods were shipped had paid her proportion.

The main principle of this decision, to the effect that the *Harter Act* only regulated the relations between the carrier and his own shippers, and did not affect relations other than the contract of carriage, has since then been adopted by this court in *The Delaware*, 161 U. S., 459.

It is therefore submitted that the limit of the Victory's liability is half, except in so far as she may be required to make up any deficiency in value, and cannot be increased by an artificial deficiency caused by the shippers' own act in releasing their own carrier.

CONCLUSION.

THE CASE SHOULD BE REVERSED, THE VICTORY SHOULD BE HELD BLAMELESS, AND THE CASE SHOULD BE REMANDED WITH INSTRUCTIONS TO ALLOW THE VICTORY THE COSTS OF ALL THE COURTS HERETOFORE INCURRED, INCLUDING THOSE OF CONTESTING THE QUESTION OF FAULT AND THOSE OF HER LIMITED LIABILITY PROCEEDINGS (Admiralty Rules 54, 55, 56).

Respectfully submitted,

ROBT. M. HUGHES,

Proctor.

No. 66 and 67.

Brief of Hughes for Victory on Costs.

Filed Dec. 27, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE CANTON INSURANCE CO., LIMITED, *et al.*, *Appellants*, *vs.* JOHN MACINTYRE, JR., *et al.* } No. 66.

JOHN MACINTYRE, JR., *et al.*, *Appellants*, *vs.* THE CANTON INSURANCE COMPANY, LIMITED, *et al.* } No. 67.

BRIEF FOR THE "VICTORY" ON THE QUESTION OF COSTS.

ROBERT M. HUGHES,
Counsel for the "Victory."

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 12-27-97

IN THE

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BRIEF FOR THE "VICTORY" ON THE QUESTION OF COSTS.

STATEMENT.

The counsel for the "Plymothian" moves the Court to send specific directions to the district court as to certain costs the final disposition of which was not provided for by the decree of the district court and is therefore still an open question. The memorandum on behalf of the shippers on the "Plymothian" contends that these costs should be charged against the owners of the "Victory" in addition to their bond. It will be remembered that these were two distinct proceedings.

There was first a proceeding by the owners of the "Vic-

tory," by petition, for limitation of liability. The usual monitions and other steps in limited-liability proceedings were taken, including an appraisal of the "Victory" for $67,500, for which a bond was given.

There was then a proceeding by the owners of the "Plymothian" for limitation of liability. The regular steps were taken on this proceeding also, including an appraisal of the "Plymothian" for about $40,000. The owners of the "Victory," whose damage was only about $13,000, filed a petition in the "Plymothian" proceeding, and the owners of the "Plymothian's" cargo did the same.

The owners of the "Plymothian," whose damage was over $40,000, and the owners of the cargo on the "Plymothian," whose damage was over $70,000, filed petitions in the limited-liability proceeding of the "Victory." The two proceedings were heard together. Each vessel claimed the benefit of the limited-liability proceedings and contested the question of fault.

The final result has been that the "Plymothian" has been held blameless and the "Victory" solely in fault, and the concluding paragraph of the opinion of this Court, while making certain provisions as to costs, does not pass upon the question whether any costs payable by the "Victory" are payable in addition to her bond or are allowable, if paid, as a credit on her bond.

At page 481 of the printed record three different classes of costs are detailed. There is no question of the fact that the costs paid by the "Victory," simply incident to establishing her limitation of liability and amounting to $1,138.48, should be allowed as a credit, and this has been done. However, there are two other classes of costs, namely, the costs incident to the "Plymothian" petition for limitation of liability proper, amounting to $736.42, and the costs incident to trying the question of fault, amounting to $945.38.

Admiralty rule No. 79 of the district court for the eastern district of Virginia provides as follows:

"Appeals shall be taken and matured as prescribed by the rules of the circuit court of appeals for this circuit. All the costs of this court shall first be paid, and the clerk shall not deliver a copy of the record till this is done."

Under this rule, as the "Plymothian" was held blameless in the district court, these two sets of costs were decreed to be paid back to the "Plymothian" equally by the shippers and the "Victory" owners; but the question whether the "Victory" should be allowed this additional credit on her bond or should be required to pay these costs in addition to her bond was left open and requires directions by this Court.

We contend, as to the first of these two classes, that the "Plymothian" cannot recover her costs incident to the limitation of liability, and, as to the second of these classes, that the costs incident to trying the question of fault (which, of course, the "Plymothian" can recover) are payable out of the bond of the "Victory" and not in addition to the bond.

We will discuss these first in reference to the costs incurred by the "Plymothian" in taking the limited-liability proceedings. We contend that the "Plymothian" simply did this as an extra precaution; that it was not a necessary proceeding, and that therefore she has no right either to charge them against the owners of the "Victory" personally or even against the "Victory's" bond.

Here, it must be remembered, that there are two ways of taking the benefit of the limited-liability act. A party whose vessel has been in collision and who is doubtful whether she will be held in fault or not, and wishes to take all chances, is not bound to file any petition for limitation of liability at all. He can set this up as one of the defenses of his answer, and in that case these costs, or by far the major portion of them, would not have been incurred. ("Scotland," 105 U. S., 24.)

In this case the "Plymothian," instead of taking the benefit of the act, could have defended by answer, and the result shows that her proceeding was not a necessary proceeding for her protection, and therefore that the costs of it are not chargeable against the losing side, or even against the bond given for the vessel, thus tending to reduce the amount to be distributed among the maritime claimants.

The "Plymothian" took this proceeding on her own responsibility and must bear the costs of it herself.

The next question of costs arises as to the costs incident to trying the question of fault.

It will be found by reference to the final decree that the district judge did not decide this question at all, but left it open for the appellate court. (R., p. 465.)

The question, simply stated, is this: When a vessel takes the benefit of limited-liability proceedings, and instead of confessing fault contests the question of fault as a part of those proceedings and not in a separate proceeding of libel and answer, and succeeds, at least to the extent that the owners are adjudged entitled to the benefit of the act, are the costs incident to trying the question of fault payable by their owners in addition to their bond, or are they taxable as part of the regular costs of the proceeding, payable out of the bond just like the trustee's commissions and the other costs of the proceeding?

It would seem that the Supreme Court rules on this subject leave little room for discussion. Here, again, we must remember that vessel-owners can get the benefit of a limitation of liability in two ways: First, by setting it up by answer and contesting that as part of their regular defense along with the defenses on the merits; and, second, by resorting to an independent proceeding, as outlined by rules 54–59 of the Supreme Court rules in admiralty. Where a party elects, instead of resorting to a separate proceeding, to set up two defenses in his answer, one of which denies liability of his vessel at all, and the other of which denies the

liability of the owners, even if the vessel is liable, and the court holds that the vessel is liable and the owners are not, in such proceeding, it is, of course, clear that the costs of the entire proceeding are recoverable against the vessel, just as in any ordinary case where a party sets up two defenses and the decision is against him on one of them; but when the vessel-owner, instead of taking this course, elects to proceed by an independent proceeding under the rule, an entirely different principle applies. In that case he comes into court, surrenders the *res*, and asks the court to adjudicate the measure of his responsibility and to whom he is responsible and distribute the proceeds accordingly. The court then is vested with jurisdiction over the trust, and all the expenses of administering the trust come out of the *res* or the bond which represents the *res*. It is exactly similar to a receivership case where the expenses of the receivership are payable before the creditors receive any dividend.

Clear as this is on principle, it is clearer under the language of the rules. Rule 54 provides, in substance, that the owner may file a petition claiming the benefit of limitation of liability and praying proper relief, and requires the court to have the *res* appraised; to require bond for the appraised value of the surrender to the trustee; to issue monition calling on everybody to make proof of claims. Under this proceeding the owners of the other vessel come in and are required, before sharing in the *res*, to prove their claim.

A necessary part of the proof of their claim in a collision case, unless fault is admitted, is proof that the other vessel was in fault, and that is clearly the meaning of rule 55, which provides—

"Proof of all claims which shall be presented in pursuance of said monition shall be made before a commissioner to be designated by the court, subject to the right of any person interested to question or controvert the same, and upon the completion of said proofs the commissioner shall make report of the claims so proven, and upon con-

firmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court, as aforesaid, or the proceeds of said ship or vessel and freight (*after payment of costs and expenses*) shall be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims duly proved and confirmed as aforesaid."

This rule expressly requires the costs and expenses of the proceeding to be paid out of the *res*, and the main proof in a collision case is the proof that the vessel so surrendered was in fault.

But, as if to put this matter beyond question, rule 56 expressly allows the vessel-owner in this proceeding, where rule 55 had previously required the costs to be paid, to contest his or their liability or the liability of their ship or vessel, provided they state the facts and circumstances by reason of which they claim exemption, and gives the other party the right, not only to contest the right of the owner to exemption, but the liability of the vessel itself; hence it is clear that the costs, appellate and original, of this proceeding ought to be paid out of the *res*.

The only case, so far as known to counsel, which passes on this question of costs is that of *In re Harris*, 57 *F. R.*, 253:

The judge does not discuss the question, and merely bases it upon the "Wanata" case, 95 U. S., 600.

The citation does not sustain his position. The "Wanata" was a case where a vessel was libelled, and set up *by answer* a defense on the merits, and also a right to limitation of liability. The court decided against them on the merits and sustained the right to limitation of liability, and it made them pay the costs, not out of their stipulation for value, and not even out of their stipulation for costs in the lower court, but out of an appeal bond which they had given. This, therefore, was a case where a party set up two defenses and the court made the costs follow the general result, just as in any ordinary lawsuit. It was not a proceed-

ing under admiralty rules 55 to 59, where the vessel-owner comes into court and surrenders his vessel or a bond for her value and asks the court to distribute it among the parties entitled thereto, thereby vesting the court with the administration of a trust. And the fact that the Supreme Court did not mean in that case to decide any such proposition is clearly shown by the subsequent case of the "Benefactor," 103 U. S., at p. 249, which was apparently unknown to the judge who announced the decision in the Harris case, and in which the Supreme Court expressly reserved the question, showing that they did not consider it settled.

SUMMARY.

1. *The costs incident to the "Plymothian's" proceeding for limitation of liability should not be charged as costs at all, her proceeding having been taken as an extra and unnecessary precaution, for she might have made the same defense by answer.*

2. *All the costs of the "Victory" incurred in contesting the question of liability, not only in the district court, but in the circuit court of appeals and in this Court, ought to be credited on the bond given by her as of the respective dates when such costs were paid.*

Respectfully submitted.

ROB'T M. HUGHES,
For the "Victory."